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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

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7
8 UNITED STATES OF AMERICA,
9 Plaintiff,
10 v.
11 DARRYL OWEN WALIZER,
12 Defendant.

2:10-cr-00124-PMP-RJJ

**REPORT & RECOMMENDATION
OF UNITED STATES
MAGISTRATE JUDGE**

Defendant's Motion to Dismiss Count Two of
the Indictment or, Alternatively, Determine
the Elements and Proof Required For
Conviction (#25)

14 This matter comes before the undersigned Magistrate Judge on Defendant's Motion to
15 Dismiss Count Two of the Indictment or, Alternatively, Determine the Elements and Proof
16 Required For Conviction (#25). The Court also considered the Government's Response (#30)
17 and Defendant's Reply (#33).

18 **BACKGROUND**

19 Darryl Owen Walizer was arrested on March 12, 2010, at the McCarran International
20 Airport. He went there in order to meet a 14-year-old girl named Alecia whose Texas flight was
21 supposed to be arriving in Las Vegas. He had met the girl over the internet, and had planned to
22 engage in unlawful sexual relations with her. In reality, Alecia was Detective Godwin of the
23 Garland Police Department. Walizer was indicted March 16, 2010, on one count of Coercion and
24 Enticement in violation of 18 U.S.C. § 2422(b) and one count of Commission of a Felony Sex
25 Offense by an Individual Required to Register as a Sex Offender in violation of 18 U.S.C.
26 § 2260A.

27 Walizer challenges the constitutionality of 18 U.S.C. § 2260A. He argues that the
28 question whether he was required to register as a sex offender must be submitted to a jury and

1 proven beyond a reasonable doubt. He also asserts that the statute should be void for vagueness
 2 and further that it is unworkable because it does not designate the mental state necessary for
 3 conviction. The Government disputes Walizer's claims.

4 5 DISCUSSION

6 **I. Whether the Elements of 18 U.S.C. § 2260A Must Be Proven Beyond a Reasonable** 7 **Doubt**

8 The Due Process Clause "protects the accused against conviction except upon proof
 9 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
 10 charged." *In re Winship*, 397 U.S. 358, 364 (1970).

11 Walizer has been charged with violating 18 U.S.C. § 2422(b) and 18 U.S.C. § 2260A
 12 Section 2422(b) reads:

13 Whoever, using the mail or any facility or means of interstate or foreign commerce,
 14 or within the special maritime and territorial jurisdiction of the United States
 15 knowingly persuades, induces, entices, or coerces any individual who has not attained
 16 the age of 18 years, to engage in prostitution or any sexual activity for which any
 person can be charged with a criminal offense, or attempts to do so, shall be fined
 under this title and imprisoned not less than 10 years or for life.

17 Section 2260A reads:

18 Whoever, being required by Federal or other law to register as a sex offender,
 19 commits a felony offense involving a minor under section 1201, 1466A, 1470, 1591,
 20 2241, 2242, 2243, 2244, 2245, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425, shall
 be sentenced to a term of imprisonment of 10 years in addition to the imprisonment
 imposed for the offense under that provision. The sentence imposed under this
 section shall be consecutive to any sentence imposed for the offense under that
 provision.

21 Walizer argues that whether he was required by Federal or other law to register as a sex
 22 offender must be proven to a jury beyond a reasonable doubt. Defendant contends that the
 23 Supreme Court has instructed that all facts that increase a maximum penalty for a crime must be
 24 proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).
 25 Defendant argues that § 2260A "effectively increases the maximum penalty [he] faces if
 26 convicted of [violating § 2422(b)]." Def. Motion (#25) at 2-3. Walizer asserts that whether he
 27 was required by Federal, or other law, to register as a sex offender cannot be proven beyond a
 28

1 reasonable doubt because § 2260A is unconstitutional. Defendant claims that § 2260A is
2 unconstitutional because it is too vague, it cannot be practically applied, and because it lacks a
3 specific mens rea.

4 The Government asserts that there is no need to prove to a jury beyond a reasonable doubt
5 that Walizer was required to register as a sex offender because he is not exposed to an increase in
6 the maximum penalty for his alleged crime. Because the maximum sentence for violation of
7 § 2422(b) is life imprisonment, the Government argues that the ten year, consecutive sentence
8 mandated by § 2260A does not increase Walizer's penalty. Furthermore, the Government
9 contends that even if it does constitute an increase in the maximum penalty, the law is not vague,
10 is easily applied, and that there is a viable mens rea.

11 At issue is whether a fact must be presented to the jury or not. Facts that, if found,
12 increase the maximum penalty a criminal defendant would receive must be presented to a jury.
13 *Apprendi* at 483. However, "the introduction of evidence of a defendant's prior crimes risks
14 significant prejudice." *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998) (holding
15 that allowing evidence of a previous conviction for an aggravated felony was too prejudicial to be
16 submitted to a jury).

17 Here, it must be shown that Walizer was required to register as a sex offender under
18 Federal or other law when he allegedly violated § 2422(b). 18 U.S.C. § 2260A. In order to
19 prove that he was required to register, the Government would have to present evidence of
20 Walizer's previous convictions for Solicitation of a Juvenile to Commit a Felony in Bedford
21 County, Virginia and Importuning in Wayne County, Ohio. Though ten years does increase the
22 maximum penalty Walizer faces¹, admitting evidence of his previous convictions would create a
23

24 ¹It is not uncommon for criminal defendants, when found guilty, to be sentenced to life
25 imprisonment plus a number of years or even consecutive life sentences. *See e.g. United States*
26 *v. Kaczynski*, 239 F.3d 1108, 1119 (9th Cir. 2001) (upholding a sentence for four consecutive life
27 sentences plus 30 years imprisonment); *Gratzer v. Mahoney*, 397 F.3d 686, 689 (9th Cir. 2005)
28 (upholding a sentence of life imprisonment plus ten years); *United States v. Rosenbohm*, 564
F.3d 820, 821-22 (7th Cir. 2009) (upholding a sentence of life imprisonment plus 10 years
pursuant to § 2260A).

1 significant risk of prejudice. In effect, evidence regarding whether Walizer must register as a sex
2 offender is so intertwined and bound up with the fact of prior conviction that it falls within the
3 exception carved out by the Supreme Court. *See Almendarez-Torres* at 233-48 (holding that
4 evidence of prior conviction could not be admitted even though there was a twenty-year possible
5 increase in sentence); *See also Blakely v. Washington*, 542 U.S. 296, 301 (2004) (*quoting*
6 *Apprendi* at 490) (holding that “Other than the fact of a prior conviction, any fact that increases
7 the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury,
8 and proved beyond a reasonable doubt.”). Therefore, evidence regarding whether Walizer was
9 required to register as a sex offender must not be submitted to the jury.

10 **II. Whether § 2260A is Unconstitutionally Vague**

11 It is established that a law fails to meet the requirements of the Due Process Clause if it is
12 so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. *City of*
13 *Chicago v. Morales*, 527 U.S. 41, 56 (1999) (*quoting Giacco v. Pennsylvania*, 382 U.S. 399,
14 402-403 (1966)). The void-for-vagueness doctrine requires that a penal statute define the
15 criminal offense with sufficient definiteness that ordinary people can understand what conduct is
16 prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
17 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The more important aspect of vagueness
18 doctrine “is not actual notice, but the other principal element of the doctrine-the requirement that
19 a legislature establish minimal guidelines to govern law enforcement.” *Kolender* at 358;
20 (*quoting Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

21 Walizer seems to believe that, in a hypothetical situation, a person not required to register
22 in State A, who lives in State A and is arrested in State A, might be charged under § 2260A
23 because he would have been required to register if his offense or domicile had been in State B.
24 *See Motion to Dismiss (#25)* at 4. That interpretation of the statute is flawed. Section 2260A
25 applies only to those offenders actually required to register, not to offenders who would have
26 been required to register had circumstances been different. Either the sex offender is required to
27 register or he is not.

28 Walizer also argues that “[i]f the penal statute at issue is applied as it currently

reads, its potential reach is extensive.” Motion to Dismiss (#25) at 4. This is not the case.

Section 2260A is limited to recidivist sex offenders who commit an additional felony involving a minor. In order to be prosecuted under the statute, a person must have already been convicted of a sexual offense that required them to register as a sex offender. Then, that person needs to commit another sex offense, but not just any sex offense will do, it must be a sex offense involving a minor under one of the enumerated sections. The statute gives no room for “policemen, prosecutors, and juries to pursue their personal predilections.” *Smith v. Goguen*, 415 U.S. 566, 575 (1972); *accord Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (admonishing against laws “making easy the roundup of so-called undesirables”). Instead, it provides guidelines for imposing an increased penalty for recidivist sex offenders that target children and minors. In fact, § 2260A is far from vague; it is quite specific.

III. Mens Rea

Walizer asks the Court to determine the elements and proof necessary for conviction, including identifying the appropriate mens rea. This is not necessary.

“We start, as always, with the language of the statute.” *Dean v. United States*, 556 U.S. — ; 129 S.Ct. 1849, 1853; 173 L.Ed. 2d 785, 792 (2009) (*quoting Williams v. Taylor*, 529 U.S. 420, 431 (2000)). Courts should “ordinarily resist reading words or elements into a statute that do not appear on its face.” *Dean* at 1853 (*quoting Bates v. United States*, 522 U.S. 23, 29 (1997)). A plain reading of the statute identifies two conditions: (1) that the person be required by Federal or other law to register as a sex offender; and (2) that the person commit a felony offense involving a minor under one of the enumerated sections. If those two conditions are met, then the court must impose a sentence of ten years, consecutive to any sentence imposed for the violation of the enumerated section. If Congress did not require any specific intent, then intent should not be read into the statute. *See Dean* at 1853. No mens rea is required. *See Dean* at 1853-56 (holding that the 10-year mandatory minimum applies if a gun is discharged in the course of a violent or drug trafficking crime, even if the statute was silent as to mental state and the discharge was an accident).

RECOMMENDATION

Based on the foregoing and good cause appearing therefore,


IT IS THE RECOMMENDATION of the undersigned Magistrate Judge that the Defendant's Motion to Dismiss or, Alternatively, Determine the Elements and Proof Required For Conviction (#25) be **DENIED**.

NOTICE

Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court on or before January 13, 2011.**

The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 30th day of December, 2010.



ROBERT J. JOHNSTON
United States Magistrate Judge